85-1886

No.——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, *et al.*,
Appellants,

v.

CONSTANCE J. HORNER, Director, Office of Personnel Management, *et al.*

On Appeal from the United States District Court for the District of Columbia

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JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether that aspect of the Gramm-Rudman Act which rescinds the previously effective 1986 cost-of-living adjustment for civil service annuitants is a taking of private property in violation of the Fifth Amendment.

PARTIES TO THE PROCEEDING

Appellants in this action are the National Association of Retired Federal Employees, a nonprofit association incorporated under the laws of the District of Columbia, and four of its officers: L. J. Andolsek, George E. Auman, Herbert H. Anderson and Monroe W. Williamson. NARFE has no parent companies, subsidiaries or affiliates. Named as defendants below were Constance J. Horner, Director, Office of Personnel Management, and the United States of America.

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JURISDICTIONAL STATEMENT

OPINION BELOW

The *per curiam* decision and order of the district court (App. A, *infra* at 1a-12a) are not yet reported.

JURISDICTION

Appellants, National Association of Retired Federal Employees ("NARFE") and its officers, four retired federal employees, brought this suit in the district court seeking a declaration that section 252(a)(6)(C)(i) of Pub. L. No. 99-177, 99 Stat. 1037 (1985) (the "Gramm-

Rudman Act") effects an unconstitutional taking of property without just compensation. On April 17, 1986, the district court entered judgment against appellants and on April 23, 1986, appellants filed their notice of appeal. App. B, *infra* at 13a. Jurisdiction of the appeal is conferred by section 274(b) of the Gramm-Rudman Act, 99 Stat. 1098. *See, also, Bowsher* v. *Synar*, 106 S.Ct. 1811 (1986) (noting probable jurisdiction in a challenge to a different section of the Gramm-Rudman Act.)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 252(a)(6)(C)(i) of the Gramm-Rudman Act, 99 Stat. 1075, provides:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the date of the enactment of this joint resolution and ending with the effective date of an order issued by the President under paragraph (1) for the fiscal year 1986 shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases

> shall be reduced to zero during such fiscal year, the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled. If such order provides for the payment of automatic spending increases during such fiscal year in amounts that are less than would have been paid but for such order, or provides for the payment of the full amount of such increases, the increases suspended pursuant to such sentence shall be restored to the extent necessary to pay such reduced or full increases, and lump-sum payments in the amount necessary to pay such reduced or full increases shall be made, for the period for which such increases were suspended pursuant to this clause.

Title 5, U.S.C. section 8340(b) provides:

> Except as provided in subsection (c) of this section, effective December 1 of each year, each annuity payable from the Fund having a commencing date not later than such December 1 shall be increased by the percent change in the price index for the base quarter of such year over the price index for the base quarter of the preceding year in which an adjustment under this section was made, adjusted to the nearest 1/10 of 1 percent.

STATEMENT

NARFE is a nonprofit, incorporated association of approximately one half million retired federal employees and survivors. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related activities, in all legislative and executive changes in these systems throughout the past six decades. Moreover, when significant legal issues have been raised by administrative or congressional action, NARFE has participated in, or itself initiated, litigation for the common good of its members. The four named plaintiffs, L. J. Andolsek, George E.

Auman, Herbert H. Anderson and Monroe W. Williamson, are all officers of NARFE and themselves retired federal employees.

NARFE initiated this action to challenge that aspect of the Gramm-Rudman Act which suspended (and later, by presidential action, rescinded) federal annuitants' 1986 cost of living adjustments ("COLAs"). Effective December 1, 1985, each annuity payable under the Civil Service Retirement and Disability Fund ("Fund") was increased by 3.1%. Yet on December 12, 1985, the President signed Gramm-Rudman into law, thereby suspending payment of these increased annuities until the issuance of a "sequestration order." On February 1, 1986, the President issued his order and thus rendered the suspension of the 1986 COLA permanent. *See* App. C, *infra* at 15a. This was unaffected by the ruling of the three-judge court in *Synar* v. *United States*, 626 F.Supp. 1374, 1381 n. 5 (D.D.C. 1986), *prob. juris. noted sub nom., Bowsher* v. *Synar*, 106 S.Ct. 1811 (1986), invalidating other features of the Gramm-Rudman Act. Accordingly, by operation of the law, appellants and all other federal annuitants are receiving annuities 3.1% less than they were entitled to on December 1, 1985.

Pursuant to section 274(a) of the Gramm-Rudman Act, NARFE brought an action before a three-judge district court. Upon consideration of the parties' cross-dispositive motions, the district court granted the government judgment on the pleadings and dismissed appellants' complaint. This direct appeal, filed pursuant to section 274(b), timely followed.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the constitutionality of a provision of the Gramm-Rudman Act adversely affecting federal annuitants. More specifically, it raises the issue of whether appellants' entitlements to increased annuities vested before passage of the

Gramm-Rudman Act, such that the provision of that law purporting to eliminate the previously declared annuity increases (section 252(a)(6)(C)(i)) is an unlawful taking within the meaning of the Fifth Amendment. In upholding the constitutionality of this statutory provision, the district court has sanctioned a diminution in annuity payments for federal retirees and their survivors that cumulates to $58 million each month. Although this suit has been brought only for civil service annuitants, the district court's decision affects military retirees, Foreign Service retirees and a host of other programs that involve automatic spending increases. The effects of the decision of the district court are thus sufficiently serious to call for plenary review by this Court.

1. This Court has stressed that property rights, whether for taking clause or for due process purposes, are not created by the Constitution. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Rather, "[w]hether such a guarantee has been given can only be determined by an examination of the particular statute or ordinance in question." *Bishop* v. *Wood*, 426 U.S. 341, 345 (1976). The pertinent statute here is 5 U.S.C. § 8340(b):

> Except as provided in subsection (c) of this section, *effective December 1 of each year*, each annuity payable from the Fund having a commencing date not later than such December 1 *shall be increased* . . .

(Emphasis added). Pursuant to this statutory directive, each annuity payable from the Fund was increased on December 1, 1985.

Congress is presumed to have expressed its purpose through the ordinary meaning of the words it uses. *Escondido Mut. Water Co.* v. *La Jolla, Rincon, San Pasqual, Pauma, and Pala Bands of Mission Indians*, 466 U.S. 765 (1984). The language here is plain. Congress provided that *effective* December 1 appellants' annuities *shall* be increased. Applying customary meaning to the emphasized words, the increase in annuities became "operative" and "valid" on December 1.

An annuity, by definition, is an amount of money payable annually. And, therefore, in 5 U.S.C. § 8340(b) Congress vested in appellants the right to an annualized payment 3.1% greater than what they had received in the previous year. *See, also,* 5 U.S.C. § 8345(a) ("Each annuity is stated as an annual amount . . .")

By allowing the increase to become effective on December 1, 1985, Congress vested in federal retirees an indefeasible right to receive that amount during 1986. As in *United States* v. *Will*, 449 U.S. 200 (1980), a different case would have been presented had Congress chosen to rescind the COLA *before* it became effective. Yet, since Congress here acted only after the increase became effective, its retroactive rescission of the increase is an unconstitutional taking.

Will was an action by federal district court judges challenging the validity of statutes that in successive years either stopped or reduced previously authorized, automatic cost-of-living salary increases. The Court pointed out that under applicable statutes, annual increases "take effect" on October 1 of each year. The Court then ruled that Congress could not alter the pay increases once they became effective:

> The statute . . . was signed by the President during the business day of October 1, 1976. By that time, the 4.8% increase under the Adjustment Act already had taken effect, since it was operative with the start of the month—and the new fiscal year—at the beginning of the day. The statute became law only upon the President's signing it on October 1; it therefore purported to repeal a salary increase already in force. Thus it "diminished" the compensation of federal judges.

449 U.S. at 225. The Court made the same finding with respect to a similar attempt to rescind a cost-of-living salary increase three years later: "Here again, the statute purported to revoke an increase *after* those statutes had

taken effect." 449 U.S. at 230 (emphasis in original): It was immaterial that Congress acted to rescind the increase before it had been paid: once the increase became *effective*, the Constitution prohibited its rescission.

The district court correctly noted that *Will* was a compensation clause case and this is a taking clause case. But the significance of *Will* is that it treated "effective" as synonymous with "operative." 449 U.S. at 225. If the increase that became effective on December 1 had been paid prior to passage of Gramm-Rudman on December 12, the government surely could not have insisted that this increase be returned in the name of Gramm-Rudman's cost-saving purpose. *Will* teaches that the fortuity of when actual delivery of the benefit is made is irrelevant. Rather, the dispositive issue is when the entitlement attaches or vests, and this is a question of statutory construction. *Will* is instructive because, relying on the language of the specific statutes at issue, it teaches that the effective or operative date is the vesting date of the entitlement for constitutional purposes.

The court below misses the point when it notes that "no other clause has a similar effect" (App. A, *infra* at 6a-7a), and thereby suggests that only where the compensation clause is involved can the claim to indefeasible rights be anchored in statutory language that makes the claimed entitlement effective or operative as of a particular date. This is plainly not so.

Bishop v. *Wood* is a Fifth Amendment case, not a compensation clause matter, and it teaches that the entitlement issue—that is, whether a protected property interest is present—is almost always a statutory construction question. That this is so is illustrated by the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Federation of Government Employees (AFGE)* v. *Campbell*, 659 F.2d 157 (D.C. Cir. 1980), *cert. denied*, 454 U.S. 820 (1981).

In this case too, the court recognized that employees have a protected right to a pay increase if the attempt by Congress to vitiate the increase occurred after the date on which the preexisting statute made the increase operative. This is so without regard to whether the increase had in fact been paid. Moreover, entitlement attaches in such a case even where the pay is not a *quid pro quo* for work already performed, but is an increase in the wage rate to be paid for the future performance of services.

Will and *AFGE* are significant, among other reasons, because they demonstrate that entitlement and receipt are separate matters. The test for entitlement purposes is whether the amount has been "fixe[d] and order[ed]," *AFGE*, 659 F.2d at 163, not whether it is physically possessed. Both here and in *Will*, the statute itself fixed and ordered the increase as of a date certain and left nothing to be done, save the ministerial task of physically making the payments.

To be sure, appellants on December 1 did not have in-hand the annual increase, or any portion of it. It is long past the time, however, when possession in the physical sense is the *sine qua non* of property. Rather the test is whether the claimant has a right to something of value, not necessarily possession of the thing. *See Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1934); *Armstrong* v. *United States*, 364 U.S. 40 (1960). As of December 1, 1985, appellants had such a property interest in an increased annuity. The Fifth Amendment secures that property against government taking and, therefore, section 252(a)(6)(C)(i) is unconstitutional.

2. The district court declined to give the language of the statutes its ordinary meaning and effect because of its view that a federal annuity, including the COLA portion, is a gift which Congress can change at any time and in any way. As the district court saw it, since the underlying annuity is susceptible to summary extirpation,

it is "incoherent" to argue that the COLA has a more protected status as property. App. A, *infra* at 6a. The court is wrong for several reasons.

First, the court attempts to dismiss the substantial constitutional question that is raised here by noting that because 'the legislature requires flexibility in financial matters" (App. A, *infra* at 9a) it always retains the power to change retirement benefits and formulas. Yet there is no principled basis for limiting this rule to federal retirement programs. According to the district court, therefore, there could never be a constitutionally enforceable claim against the federal purse.

More than this fallacy of overbreadth, is the fact that these issues cannot be resolved by such generalized observations. Whether or not an indefeasible entitlement is present turns on the particular statute involved. *Bishop* v. *Wood*, 426 U.S. at 345.

Second, the issue of whether federal annuitants and their survivors have an indefeasible property interest in their underlying annuities is a substantial one. The court below concluded that this is a closed question and noted that "Congress is [clearly] free to reduce or eliminate . . . retirement annuities." App. A, *infra* at 6a. In fact, the issue is an open one. It was purposefully left open in *National Treasury Employees Union* v. *Devine*, 591 F.Supp. 1143 (D.D.C. 1984), *aff'd*, 785 F.2d 324 (Fed. Cir. 1985) and, although it was not an issue in *Zucker* v. *United States*, 758 F.2d 637 (Fed. Cir.), *cert. denied*, 106 S.Ct. 129 (1985), the court there observed that the underlying annuity can attain constitutional status. *Zucker*, 758 F.2d at 640. While there is support for the district court's view in the twenty-five year old decision of *Stouper* v. *Jones*, 284 F.2d 240 (D.C. Cir. 1960), this Court has never addressed the issue.

At all events, we are dealing here with the entitlements that stem from a particular statutory provision: 5 U.S.C. § 8340(b). In order to decide what rights are created by this provision, the Court need not reach the question of whether there is an indefeasible and indefinite right to the underlying annuity. The district court apparently believed that this question had to be resolved because of its assumption that we were claiming entitlement to the COLA portion only. This is not the case.

The statute guaranteed to annuitants more than just the COLA. Rather, by the terms of 5 U.S.C. § 8340(a), Congress directed that effective December 1, 1985 the Office of Personnel Management shall increase each retiree's and survivor's annual account by a factor of 3.1%. December 1 having come and passed, appellants' entitlements to the sums in their retirement accounts vested. Any diminution of those accounts *for 1986*, either from the COLA portion or from the underlying annuity, constitutes an unconstitutional taking.

If Congress decides before December 1, 1986 to suspend or eliminate the COLA for 1987, or even to alter in some way the non-COLA portion of the annuity, the question of appellants' general rights to their annuity, and the right to a specific formula for determining the COLA, will arise. In fact, these issues have been presented in varying degrees in *Zucker*, in *National Treasury Employees Union and National Association of Retired Federal Employees*, and in *Stouper* v. *Jones*. They are not presented here.

Accordingly, contrary to the views of the district court, there is nothing "incoherent" or inherently inappropriate about pretermitting consideration of the fundamental issues raised in *Stouper* and similar cases, and addressing the narrower question of whether the Constitution permits the rescission, after the date the entitlement vests, of an annuity of a prescribed amount

made effective and operative for a one year's duration. The court below erred in failing to realize that it was this narrower question only that was presented here.

3. That the question here is narrower than the court below believed does not in any way diminish the fact that it is a substantial and important one. Congress has declared the importance in decreeing that appellant's claims be specially and expeditiously considered. Moreover, as noted above, the immediate impact of the district court's ruling is to sanction a collective diminution in annuity payments of $58 million each month. Other programs, too, are affected by the challenged provisions of Gramm-Rudman.

Additionally, the district court has posited the view that the compensation clause is unique among the clauses of the Constitution. According to the district court, where the taking clause of the Fifth Amendment is concerned, statutory language conferring a pecuniary benefit and making it effective and operative as of a date certain and for a prescribed duration can be ignored. The court suggests that this is so because "the legislature requires flexibility in financial matters."

The proposition is as extraordinary in the context of this case as it is wrong. This Court recently noted in quoting Justice Black that "[g]reat nations like great men, should keep their word." *Heckler* v. *Mathews*, 465 U.S. 728, 748 (1948). This is not only a moral imperative, but in the context of this case, it is enforceable by the Fifth Amendment.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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May, 1986

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-4021

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, *et al.*,
Plaintiffs,

v.

CONSTANCE J. HORNER, *et al.*,
Defendants.

[Filed April 17, 1986]

Joseph S. Scott, with whom *Irving Kator* and *Michael J. Kator* were on the brief, for plaintiffs.

Richard Greenberg, Attorney, United States Department of Justice, with whom *Richard K. Willard*, Assistant Attorney General, *Joseph E. diGenova*, United States Attorney, and *David J. Anderson* and *Judith F. Ledbetter*, Attorneys, United States Department of Justice, were on the brief, for defendants.

Keith E. Secular and *John S. Bishop*, Cohen, Weiss and Simon, and *Devon L. Miller*, Staff Attorney, National Association of Letter Carriers, AFL-CIO, were on the brief for *amicus curiae* National Association of Letter Carriers, AFL-CIO.

Before BORK, *Circuit Judge* of the United States Court of Appeals for the District of Columbia Circuit, PENN

and HOGAN, *District Judges* of the United States District Court for the District of Columbia.

PER CURIAM: Plaintiffs, National Association of Retired Federal Employees and its officers, four retired federal employees, seek a declaratory judgment that section 252(a)(6)(c)(i) of Pub. L. No. 99-177, 99 Stat. 1037 (1985), popularly known as the Gramm-Rudman-Hollings Act, effects an unconstitutional taking of property without just compensation under the fifth amendment. Plaintiffs also request that we permanently enjoin the defendants, the Director of the Office of Personnel Management and the United States, from applying the section to plaintiffs and their class. Both plaintiffs and defendants have moved for judgment on the pleadings. We grant the defendants' motion, deny the plaintiffs' motion, and hold that section 252(a)(6)(c)(i) is not unconstitutional as applied to plaintiffs.

I.

The facts are not in dispute. Plaintiffs represent approximately 500,000 retired federal employees receiving annuities under the Civil Service Retirement Act, 5 U.S.C. § 8331 *et seq.* (1982). As amended, the Act covers almost 90% of all federal employees and requires a mandatory 7% contribution from most covered employees which is matched by the employing agency. *See* 5 U.S.C. § 8334(a)(1). Benefit levels are determined according to a formula based on the employee's length of employment and rate of pay. *See id.* §§ 8331(4), 8339.

In 1962, Congress provided automatic increases in benefit levels to prevent any significant loss of purchasing power due to inflation. *See* Pub. L. No. 87-793, 76 Stat. 869 (1962). The cost of living adjustment ("COLA") has been altered many times since it was first enacted. The most recent instance was in 1984 when Congress altered the COLA formula and delayed the payment date to reduce the costs of the program. *See* Pub. L. No.

98-270, § 201, 98 Stat. 157 (1984), 5 U.S.C.A. § 8340(b) (West Supp. 1985). Congress thought such cuts necessary because annual benefit payments and administrative expenses now vastly exceed annual employee contributions. In fiscal year 1985, for example, employee contributions amounted to only $4.5 billion while expenses exceeded $23.1 billion. *See* U.S. Office of Personnel Management, *Compensation Group Fiscal Year 1985 Annual Report* at B-2. Expenses in excess of employee contributions must be made up out of general revenues.

The 1984 enactment provides in pertinent part:

> [E]ffective December 1 of each year, each annuity payable from the Fund having a commencing date not later than such December 1 shall be increased by the percent change in the price index for the base quarter of such year over the price index for the base quarter of the preceding year in which an adjustment under this subsection was made, adjusted to the nearest 1/10 of 1 percent.

5 U.S.C.A. § 8340(b) (West Supp. 1985). "Each annuity is stated as an annual amount, one-twelfth of which, rounded to the next lowest dollar, constitutes the monthly rate payable on the first business day of the month after the month or other period for which it has accrued." 5 U.S.C. § 8345(a) (1982). Thus, on December 1, 1985, retirement benefits began accruing at a rate 3.1% higher than the previous month. The increase for the first month was to be paid on January 2, 1986.

On December 12, 1985, however, the President signed into law the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, which suspended payment of the COLA increase. Section 252(a)(6)(c)(i) of the Act provides in part:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the date of the enactment of this joint resolution and ending with the effective date of an order

> issued by the President under paragraph (1) for the fiscal year 1986 shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during such fiscal year, the increases suspended pursuant to the preceding sentence and and any legal rights thereto shall be permanently cancelled.

Pub. L. No. 99-177, § 252(a)(6)(c)(i), 99 Stat. 1037 (1985). On February 1, 1986, the President issued an order permanently cancelling as of March 1, 1986, the COLA that became effective on December 1, 1985, but that had not yet been paid. *See* Order, *Emergency Deficit Control Measures for Fiscal Year 1986*, 51 Fed. Reg. 4291 (1986).[1]

II.

Plaintiffs' claim is that on December 1, 1985, the 3.1% COLA scheduled for the next twelve months became the private property of the plaintiffs subject only to the limitation that it was payable in twelve monthly installments accompanying payment of the underlying annuities. Thus, it is said that by suspending COLA payments on

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[1] In Synar v. United States, 626 F. Supp. 1374 (D.D.C.), *prob. juris. noted sub nom.* Bowsher v. Synar, 106 S. Ct. 1181 (1986), a three-judge district court invalidated the automatic deficit reduction process on the ground that it confers upon the Comptroller General executive powers, which cannot be exercised constitutionally by an officer removable by Congress. *Id.* at 1403. This holding also rendered the President's order without legal force and effect since it was issued pursuant to the automatic reduction process. The court stayed the effect of its decision pending an appeal to the Supreme Court.

The current controversy remains justiciable, however, since, regardless of the fate of the President's order, the Act's suspension of COLA payments remains effective throughout the fiscal year. *See Synar*, 626 F. Supp. at 1381 n.5.

December 12, 1985 the Act effected a taking of plaintiffs' private property in violation of the Constitution.

The fifth amendment provides that "private property [shall not be] taken for public use, without just compensation." U.S. Const. amend. V. The dispute is whether the COLA became the "private property" of the plaintiffs on December 1, 1985. We hold that it did not.

Plaintiffs concede that the Constitution does not create a property right to receive the contested COLA. They also concede that no legislative history indicates anything, one way or the other, about a congressional intention to create a property right. Rather, their argument is that the plain meaning of the statute providing for COLAs establishes their property right in the COLA. They rely for that conclusion on the language making December 1, 1985, the date the COLA becomes "effective" and the language providing that "[e]ach annuity is stated as an annual amount." Thus, they claim, the 3.1% COLA for a whole year became their property on December 1 and could not be eliminated by Congress on December 12. It is utterly clear, however, that the statute cannot be read as plaintiffs wish.

Stouper v. *Jones*, 284 F.2d 240 (D.C. Cir. 1966), effectively decides the present case. The appellant there retired in 1953 and began receiving disability annuity payments pursuant to the law then in force. In 1956, Congress amended that act to discontinue benefits to certain recipients. The Civil Service Commission found that appellant fell within the designated class and discontinued her annuity payments. Appellant argued that that 1956 amendment could not "constitutionally be applied to her case because at the time of her retirement she acquired a vested right to an annuity that could not be taken from her by subsequent legislation." 284 F.2d at 242. A unanimous panel, composed of Chief Judge Miller and Judges Burger and Bazelon, "conclud[ed] that an employee has no right under the Retirement Act

based on contractual annuity principles, and [held that] the appellant had no vested right to the disability annuity which was terminated." *Id.* The court held, therefore, that a retirement benefit that had already become effective could be cancelled by Congress at any time.

Plaintiffs' efforts to distinguish their case from *Stouper* are unavailing. Plaintiffs insist that *Stouper* does not govern because they do not claim a vested right in the underlying annuities but only in the scheduled COLA increases. The argument is incoherent. If Congress is free to reduce or eliminate plaintiffs' retirement annuities, as it clearly is, acceptance of plaintiffs' claim would mean that Congress could constitutionaly eliminate the entire annuity except for the 3.1% increase. This makes even less sense given plaintiffs' claim that they are entitled to the increase for an entire year because the entire annuity is calculated as an annual amount.

Stouper is not distinguishable on the ground that there Congress enacted new conditions upon the right to continued disability benefits and the cut off of payments occurred one year after an administrative finding that plaintiff was no longer qualified. Whatever the mechanism, Congress, there as here, legislated an end to benefits it had previously enacted. There is also no significance to the fact that in the present case Congress' cut off of future payments also eliminated amounts that had "accrued" between December 1 and December 12. Those amounts had not been paid, no property right is created by an accounting formula, and *Stouper* therefore holds that payments of any and all amounts can be precluded.[2]

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[2] Plaintiffs' reliance upon cases such as United States v. Will, 449 U.S. 200 (1980); Foley v. Carter, 526 F. Supp. 977 (D.D.C. 1981); and Goldberg v. Kelly, 397 U.S. 259 (1970), is utterly misplaced. *Will* held that the compensation clause of article III of the Constitution prohibits Congress from repealing an increase of judicial salaries that had gone into effect under a statutory formula. Plaintiffs here are not covered by the compensation clause and

Nor can there be any claim that the 1984 statute establishing the scheduled COLA creates the property interest plaintiffs assert independent of the underlying statutory scheme. The statute provides that "[e]ffective December 1 of each year, each annuity . . . shall be increased by" a COLA. 5 U.S.C.A. § 8340(b) (West Supp. 1985). This makes clear that there is no distinction between some "underlying" annuity and the COLA. The COLA is merely part of the calculation of the current annuity. Thus, on December 1, 1985, the calculation of benefits increased by 3.1% over the previous month. Had Congress not intervened on December 12, 1985, the monthly annuity payment on January 2, 1986 would have reflected that increase. Since under *Stouper* Congress can decrease the annuity at any time, we see no reason why it cannot increase the rate at which the annuity is calculated and then decreased it again before payment.

Any other construction would be inconsistent with the history of COLA legislation. Beginning in 1976, Congress repeatedly amended the COLA provision to reduce the cost of the program. In 1976, Congress repealed the 1% "kicker" that was previously added to each COLA. *See* Pub. L. No. 94-44, 90 Stat. 1462 (1976). This repeal was upheld in *Zucker* v. *United States*, 758 F.2d 637 (Fed. Cir.), *cert. denied*, 106 S. Ct. 129 (1985). There,

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Stouper means that no other clause has a similar effect. *Foley* held that Congress could reduce a salary increase for non-article III judicial employees but could not retroactively reduce the rate of pay for work already performed. The holding rests entirely upon a quid-pro-quo concept and has no application to retirement benefits for which no services are claimed to have been performed between December 1 and 12. *Goldberg* requires procedural due process prior to the termination of welfare benefits. It has absolutely no application to this case since plaintiffs do not allege a constitutionally insufficient procedure. Neither in *Goldberg* nor anywhere else has the Supreme Court ever suggested that interests sufficient to require procedural due process must also constitute property for purposes of substantive constitutional claims.

the court explicitly rejected the claim that retirees have a constitutionally protected right to receive COLAs based on the formula in effect at the time of their retirement. In 1981, Congress again amended the COLA provision to replace the then twice-yearly COLA with a single annual adjustment. *See* Pub. L. No. 97-35, § 1702(a), 95 Stat. 357 (1981). The NARFE's subsequent challenge to this amendment as an unconstitutional taking of private property without just compensation was rejected in *NTEU* v. *Devine*, 591 F. Supp. 1143 (D.D.C. 1984), on the ground that there is no "protected property interest in the COLA benefits." *Id.* at 1147; *see id.* at 1148-49.

The current COLA provision was the last congressional effort to reduce the spiraling costs of the retirement program before the enactment of Gramm-Rudman. The 1984 enactment deferred the effective date of the annual COLA from March 1 to December 1, thereby effecting substantial savings. *See* Pub. L. No. 98-270, § 201, 98 Stat. 157 (1984). It is highly unlikely that, by legislating a delay in the effective date of COLAs, Congress intended to grant plaintiffs a vested right to a year's worth of COLA increases. Certainly Congress did not believe that to have been the effect of the statute since it felt free in enacting Gramm-Rudman on December 12, 1985, to suspend the payment of scheduled COLA increases.

We need not speculate whether Congress could legislate a retirement benefit in language that precluded itself or any future Congress from decreasing or eliminating that benefit. Plaintiffs have cited no case, and we know of none, holding that Congress may tie its own hands in this fashion. Assuming that to be possible, however, it is clear that the presumption against reading a statute to have such an effect overcomes language much stronger than that under consideration here. In *Dodge* v. *Board of Education*, 302 U.S. 74 (1937), a retired school teacher challenged the constitutionality of a state statute reducing the amount of her retirement annuity from $1500 to $500. The statute in effect at the time of her retirement

provided: "Each person so retired . . . *shall be paid* the sum of fifteen hundred dollars ($1500.00) annually and for life from the date of such retirement . . . ." *Id.* at 76 (emphasis added). Despite this unconditional, mandatory language, the Court upheld the reduction, stating "[t]he presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Id.* at 79.

The reasons for the strength of the presumption enunciated in *Dodge* are apparent: the legislature requires flexibility in financial matters. Hence, what the Supreme Court said of the social security program a quarter century ago applies to the retirement annuities at issue here:

> That program was designed to function into the indefinite future, and its specific provisions rest on predictions as to expected economic conditions which must inevitably prove less than wholly accurate, and on judgments and preferences as to the proper allocation of the Nation's resources which evolving economic and social conditions will of necessity in some degree modify.

Flemming v. *Nestor*, 363 U.S. 603, 610 (1960). The law is so clear and consistent that plaintiffs must be judged to have not the shadow of a case.

Defendants' motion for judgment on the pleadings is granted, plaintiffs' motion for judgment on the pleading is denied, and plaintiffs' claim is hereby

Dismissed.

/s/ Robert H. Bork
ROBERT H. BORK, Circuit Judge
of the United States Court of
Appeals for the District of
Columbia Circuit

/s/ John Garrett Penn
JOHN GARRETT PENN, District
Judge of the United States
District Court for the
District of Columbia

/s/ Thomas F. Hogan
THOMAS F. HOGAN, District
Judge of the United States
District Court for the
District of Columbia

Apr 16 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 85-4021

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, *et al.*,
Plaintiffs,

v.

CONSTANCE J. HORNER, *et al.*,
Defendants.

[Filed April 17, 1986]

ORDER

This comes before the Court on cross-motions for judgment on the pleadings filed by the parties. Having given careful consideration to the motions, the oppositions thereto, the record in this case, and the arguments of counsel, the Court concludes, for the reasons set forth in the accompanying opinion, that defendants' motion should be granted and plaintiffs' motion should be denied.

In view of the above, it is hereby

ORDERED that plaintiffs' motion for judgment on the pleadings is denied, and it is further

ORDERED that defendants' motion for judgment on the pleadings is granted, and it is further

ORDERED that this case is dismissed.

/s/ Robert H. Bork
ROBERT H. BORK, Circuit Judge
of the United States Court of
Appeals for the District of
Columbia Circuit

/s/ John Garrett Penn
JOHN GARRETT PENN, District
Judge of the United States
District Court for the
District of Columbia

/s/ Thomas F. Hogan
THOMAS F. HOGAN, District
Judge of the United States
District Court for the
District of Columbia

Apr 16 1986

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 85-4021
(three-judge court)

NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, an incorporated association, *et al.*,
Plaintiffs,

v.

CONSTANCE J. HORNER, Director
Office of Personnel Management, *et al.*,
Defendants.

NOTICE OF APPEAL

Notice is hereby given that the National Association of Retired Federal Employees and its named officers, plaintiffs above-named, appeal to the Supreme Court of the United States from the April 17, 1986 judgment of this Court denying their claims for declaratory and injunctive relief. Plaintiffs note this appeal pursuant to Pub. L. No. 99-177 § 274(b).

Respectfully submitted,

KATOR, SCOTT & HELLER

/s/ Irving Kator
IRVING KATOR

/s/ Joseph B. Scott
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Washington, D.C. 20005
(202) 393-3800
Attorneys For Plaintiffs

Date: 4/23/86

Certificate of Service

I hereby certify that a copy of the foregoing notice was served upon

Michael Davidson, Esq.
Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510

Steven Ross, Esq.
General Counsel
Office of the Clerk
U.S. House of Representatives
Room H-105
Washington, D.C. 20505

W. Scott Burke, Esq.
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1900 E Street, N.W.
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Richard Greenberg, Esq.
Department of Justice
Washington, D.C. 20530

and

Joseph E. DiGenova, Esq.
United States Attorney
Room 2800
U.S. Courthouse
Third and Constitution Ave., N.W.
Washington, D.C. 20001

by first class mail, postage prepaid this 23rd day of April, 1986.

/s/ Joseph B. Scott

APPENDIX C

ORDER

Emergency Deficit Control Measures for Fiscal Year 1986

By the authority vested in me as President by the statutes of the United States of America, including section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985 (hereafter referred to as "the Act"), I hereby order that the following actions be taken immediately to implement the required sequestration or reduction determined by the Comptroller General in his report dated January 21, 1986, under section 251 of the Act:

(1) Each automatic spending increase which, but for the passage of the Act, would be first paid on or after the enactment of the Act during fiscal year 1986 is suspended as provided in section 225(a)(6) and subject to provisions set forth in sections 255, 256, and 257 of the Act. The programs with such 1986 automatic spending increases subject to reduction in this manner, specified by account title, are: Central Intelligence Agency retirement and disability system fund; Civil service retirement and disability fund; Comptrollers general retirement system; Foreign service retirement and disability fund; Military retirement fund; National Oceanic and Atmospheric Administration retirement; Railroad Retirement Tier II; Retired pay, Coast Guard; Retirement pay and medical benefits for commissioner Public Health Service officers; Special benefits, Federal Employees' Compensation Act; National Wool Act; Special milk program; and Vocational rehabilitation.

(2) New budget authority and unobligated balances amounts for major National Defense functional category (050) are sequestered according to the procedures set forth in section 252(a)(2) of the Act.

(3) For non-defense accounts in the Federal budget, the following are sequestered: new budget authority, new loan guarantee commitments, new direct loan obligations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, as amended, and the reduction of obligation limitations, for each account and for each program, project, and activity, as defined pursuant to section 252(a)(1)(B)(i) of the Act, or each budget account activity as defined pursuant to section 252(a)(1)(B)(ii) of the Act.

(4) For accounts making payments otherwise required by substantive law, the head of each Department or agency is directed to modify the calculation of each such payment to the extent necessary to reduce the estimate of total required payments for the remainder of the fiscal year (a) where payments are not made from spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, as amended, to the level of remaining budgetary resources or (b) where payments are made from spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, as amended, to the estimated level of payments included in the Comptroller General determination on January 21, 1986, of required sequestration or reduction action.

(5) For accounts making commitments for guaranteed loans and obligations for direct loans subject to limitation otherwise required by substan-

tive law, the head of each Department or agency is directed to modify the calculation of such commitments or obligations to the extent necessary to conform to the limitations established by the Act and specified in the Comptroller General determination of January 21, 1986.

(6) Each Department or agency head may, to the extent not otherwise prohibited by law, use existing authority to deobligate balances of budgetary resources as necessary to apply the required reduction or sequestration in as uniform a manner as possible for any person or other recipient entitled to payments under any formula-driven calculations specified in the substantive law. Deobligations may include budgetary resources obligations for which checks have not been issued or funds not otherwise disbursed (funds obligated but unexpended).

Also, the head of each Department or agency shall report the programs, projects, and activities information required by section 252(a)(5)(A) and (B) to the President of the Senate, the Speaker of the House, the Director of the Office of Management and Budget, and the Comptroller General, as instructed by the Director of the Office of Management and Budget in Bulletin No. 86-7. For those programs in the National Defense function that have already been reported by program, project, and activity, no additional report is necessary. The reports of the Departments and agencies are hereby incorporated in this Order.

I further direct the Director of Central Intelligence to report the programs, projects, and activities information required by section 252(a)(5)(A) and (B) on a classified basis to the appropriate committees of the Congress for the National Foreign Intelligence Program consistent with paragraphs 1 through 3 of this Order and to so

advise the President of the Senate, the Speaker of the House, the Director of the Office of Management and Budget, and the Comptroller General, as instructed by the Director of the Office of Management and Budget.

In accordance with section 252(a)(6)(A), amounts suspended, sequestered or reduced under this Order shall be withheld from obligation and amounts suspended or sequestered shall be permanently cancelled as of March 1, 1986, unless alternative legislation is enacted prior to that date.

This Order shall be reported to the Congress and shall be published in the *Federal Register*.

/s/ Ronald Reagan

THE WHITE HOUSE,

February 1, 1986.